IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 16, 2008 Session

ESTATE OF MARTHA S. FRENCH v. THE STRATFORD HOUSE, ET AL.

Appeal from the Circuit Court for Hamilton County
No. 04C490 L. Marie Williams, Judge

No. E2008-00539-COA-R3-CV - FILED JANUARY 29, 2009

This case involves a complaint for personal injury and wrongful death filed by Kimberly S. French ("the Administratrix"), Administratrix of the Estate of Martha S. French ("the Deceased"), against the owners and operators of a nursing home ("the Defendants").[1] The Deceased was a resident of the nursing home – The Stratford House – from April 3, 2003, to July 23, 2003. The Administratrix claims that the Defendants failed to provide the Deceased with basic care such as filling her water pitcher, feeding her, cleaning her after incontinence, bathing her and turning her every two hours to avoid pressure sores. The Administratrix argues that, due to lack of care, the Deceased developed pressure sores that were not properly treated, became infected and ultimately caused her death from sepsis. The Administratrix, who is the daughter of the Deceased, brought suit, alleging claims for ordinary negligence, negligence *per se* under state and federal regulations of nursing homes, violations of the Tennessee Adult Protection Act ("TAPA"), Tenn. Code Ann. § 71-6-101 *et seq*. (2004 & Supp. 2008), and medical malpractice under Tenn. Code Ann. § 29-26-115 *et seq.* (2000 & Supp. 2008). The trial court held that the only cognizable claims against Stratford House were for medical malpractice. The court granted the Defendants summary judgment on all of the Administratrix's non-medical malpractice claims and on her claim for punitive damages. Two of the defendants sought summary judgment as to all of the claims; the court denied their motion. The Administratrix appeals and both sides raise issues. We affirm in part and vacate in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Vacated in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

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[1] During the Deceased's time at Stratford House, it was owned and operated from April 3, 2003 to May 16, 2003 by HP/Stratford House, Inc., and HP/Holdings. On May 17, 2003, operations were transferred to The Stratford House, OP Chattanooga, Inc., Tandem Health Care, Inc., and Tandem Health Care of Ohio, Inc. These six entities are referred to collectively as the Defendants.

M. Chad Trammell and S. Drake Martin, Jackson, Tennessee, Richard C. May, Knoxville, Tennessee, and Brian G. Brooks, Greenbrier, Arizona, for the appellant Kimberly S. French, Administratrix of the Estate of Martha S. French.

Clifford Wilson, Nashville, Tennessee, for the appellees HP/Stratford House, Inc., and HP/Holding, Inc.

Alaric H. Henry and Thomas M. Horne, Chattanooga, Tennessee, for the appellees, OP Chattanooga, Inc., Tandem Health Care, Inc., Tandem Health Care of Ohio, Inc., and The Stratford House.

OPINION

I.

This case is at the summary judgment stage. It comes to us as a "final judgment" pursuant to the provisions of Tenn. R. Civ. P. 54.02. We agree with the trial court's decision to grant the Defendants summary judgment on the Administratrix's non-medical malpractice claims because we find no disputed issues of *material* fact and conclude, as did the trial court, that all of the Administratrix's claims fall under the medical malpractice statutory scheme. As to the Administratrix's claim for punitive damages, we disagree with the trial court's decision to grant the Defendants summary judgment; and with respect to the claim of some of the Defendants that they are entitled to summary judgment on the medical malpractice claims, we agree with the trial court's decision to deny these Defendants summary judgment. Summary judgment with respect to these two latter matters is not appropriate in view of the fact that, with respect to both, there are genuine issues of material fact.

The parties view the facts in this case quite differently. As emphasized by the Administratrix, the facts are as follows. The Deceased was a registered nurse, who suffered two debilitating strokes. Following the second stroke she became a resident at Highland Manor Nursing Home in Portland, Tennessee. In addition to the effects of the strokes, which included bouts of dementia, she suffered from diabetes (for which she was on insulin) and arterial fibrillation, for which she had a pacemaker.[2] She spent three years at Highland Manor. She was a total care patient. Total care included, but is not limited to, feeding, bathing, linen changes and basic grooming.

When the Deceased moved to Stratford House, she had lacerations on her heels, but no pressure sores. Stratford House viewed the Deceased as malnourished and recommended the use of a feeding tube, but the Administratrix refused to consent to this approach. The Administratrix's expert, Dr. Absolam Tilley, takes issue with the observation that the Deceased was malnourished.

[2] The Defendants' expert testified that she suffered from malnutrition, depression and psychosis. The expert did not mention dementia.

He testified that, while at both nursing homes, she had adequate protein levels in her system. He based this opinion on the fact that she had previously been able to heal her sores. He does, however, say that she was malnourished in the last days of her life.

In mid-July 2003, the Deceased developed a low-grade fever and had low blood pressure. A Stratford House employee, or employees, tried for several days to reach the Administratrix to present her with the option of taking the Deceased to the hospital or placing her in hospice care. Only after the nursing home reached the Administratrix on July 23, 2003, was the Deceased transferred to Erlanger Medical Center. Upon arriving at Erlanger, she had a Stage IV to-the-bone pressure ulcer on her sacrum that exposed the bones of her spinal column. She had other pressure sores as well. A foul stench emanated from the sores, indicating a severe infection. She also had a urinary tract infection.

Erlanger staff aggressively treated the Deceased. She was given a large amount of IV fluids to better hydrate her and to increase her blood pressure. But when it became clear that respiratory failure was imminent, the Erlanger staff gave the Administratrix the option of making the patient "comfort care only," meaning that treatment was stopped and the focus was on keeping the Deceased pain-free. She died on July 26, 2003.

The Administratrix's expert, Dr. Tilley, testified that respiratory arrest "was the final event in this patient's life, but not the cause of death." Dr. Tilley testified that it was more probable than not – or within a reasonable degree of medical certainty – that she contracted sepsis and died from it. He said that the failure of Stratford House to prevent the development of pressure sores and to properly treat the ulcers that developed caused her death because the pressure ulcers severely compromised her ability to fight off sepsis and infections. Both Dr. Tilley and Teresa Lowry, a nursing expert who testified for the Administratrix, said that failures of Stratford House to provide basic care such as turning and repositioning, feeding, providing hydration and keeping her clean after incontinence caused her injuries and death.

The Defendants suggest that the Administratrix's failure to regularly visit her mother, refusal to agree to a feeding tube and being difficult to reach by telephone contributed to her mother's death. They also questioned the wisdom of the do-not-resuscitate order ("DNR") in place. When asked about these things, Dr. Tilley testified that the standard of care that a patient gets should be the same whether the family is there or not. He rejected emphatically the implication that the fact the daughter might not have called or visited meant that it was okay for the nursing home to allow the pressure sores to deteriorate into sepsis and death. He also testified that DNRs are usually a matter of a family decision made ahead of any anticipated use, noting that the Deceased was a nurse and certainly would have been familiar with DNRs and the reasons for their employment.

In support of the Administratrix's response to the Defendants' motion for partial summary judgment, she submitted nine depositions of former employees of Stratford House. The Administratrix summarized the deposition testimony as follows:[3]

> 1. The majority of the hands-on care provided to residents of the Stratford House, [Defendants'] nursing home, was given by Certified Nurse Assistants (CNAs) . . . . This care included feeding residents, bathing residents, encouraging residents to drink and providing water for them to drink, cleaning residents up after periods of incontinence and turning and repositioning residents. . . .
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> 2. Caregivers were aware that this care was necessary to maintain the health of residents like [the Deceased] and to prevent, among other things, the development of pressure sores. . . .
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> 3. Defendants' nursing home was chronically understaffed to the point caregivers could not perform the services necessary to care for residents. . . . Tasks such as feeding residents, turning and repositioning residents, encouraging fluids, cleaning residents after periods of incontinence, bathing residents and changing pads underneath residents could not be done in a timely fashion, and as the needs of the residents dictated, because of understaffing. . . . [O]ne CNA would provide care for as many as 62 residents at a time. . . .
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> 4. The understaffing was caused by lack of funding and hiring more staff would "cut into . . . bonuses or whatever, so they couldn't do that.". . . The administrator of the Stratford House received a bonus based on bottom-line profitability. . . . Staff was the single most costly item in the budget of the Stratford House. . . .
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> 5. The result of this understaffing was that residents were left laying in their own urine so long that it dried and formed brown rings on the bed sheets and were left laying in their own feces so long that it dried to their bodies and was difficult to remove. . . . Rather than changing a pad beneath residents when they were wet, caregivers had to place multiple pads beneath them, sometimes as many as seven at a time. . . .
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> 6. [The Deceased] was one resident who suffered lack of care because of this understaffing. [The Deceased] was not turned and

[3] The citations to specific depositions are omitted, but are found in the Administratrix's first brief at pages xiv-xvii. Certain pejorative statements in the summary are also omitted.

> repositioned as needed and was . . . in her own urine so long that it dried and formed rings on her bed sheets. . . .While [the Deceased] would eat if she was encouraged to do so and drink if time was taken with her, caregivers found that they did not have the time necessary to feed her or encourage fluids. . . . [C]aregivers did not have enough time to turn and reposition [the Deceased] as required to meet her needs. . . .
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> 7. Defendants were aware of this shortage of caregivers. One of the caregivers who testified to chronic staff shortages was [the Defendants'] staffing coordinator, Stephania Williams. Also, the caregivers who testified consistently reported the staff shortage to their supervisors and some specifically reported it to the [Defendants'] administrator and director of nursing. . . .
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> 8. [The Defendants increased] staff during times when state inspectors, known as surveyors, were in the facility. The caregivers uniformly testified that [the Defendants'] increased staff during these surveys and that resident care improved. However, the situation returned to the norm of understaffing once surveyors left. . . .
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> 9. These caregivers also testified to charting deficiencies. First, they acknowledged the importance of accurate charting. However, several caregivers also noted that they observed "blanks" in charts and charts that were filled in ahead of time. . . . [Michelle Hogan testified] that a secretary on one wing . . . "would take all the ADLS [charts for activities of daily living] that were not filled out and she would just fill them out so that they were all complete . . . ."

There was also testimony that when there was a change in operators, the new company fired everyone in the laundry and rehired employees back at a lower salary. There were problems with morale and there was a period during which towels and sheets were not being timely washed.

The Administratrix's position is that, during the Deceased's stay at Stratford House, she "suffered multiple personal injuries, severe physical pain and suffering, as well as mental anguish and humiliation, and ultimately death and that these injuries were a result of the Defendants' failures to meet its obligations to care for [the Deceased], primarily 'to provide sufficient and adequately-trained nursing staff to meet her needs.' "

As might be expected, the Defendants urge a different view of the facts. Prior to coming to Stratford House, the Deceased was at another nursing home. She was malnourished. The former nursing home had asked that a feeding tube be utilized, but the Administratrix refused. When admitted to Stratford House in April 2003, the Deceased was malnourished. She suffered from "pre-

existing medical conditions, including cerebrovascular accident, hypertension, atrial fibrillation, diabetes, cardiac dysrhythmia, arthopathy, hemiplegia, depression and anxiety." She was taking medications for treatment of these conditions. Although she had no pressure ulcers on admission, she had previously had such ulcers; the Deceased's malnourishment and diabetes increased her risk of developing such ulcers. Stratford House also recommended use of a feeding tube, but the Administratrix refused to give her consent.

In July 2003, the Deceased developed a low-grade fever with low blood pressure. Being given the option of placing the Deceased in hospice care or taking her to the hospital, the Administratrix chose to have her mother taken to Erlanger Medical Center. Erlanger's admission records show no evidence of abuse.

The Defendants' expert, Dr. Cifu, opined that Erlanger treated the Deceased's condition aggressively, including giving her a substantial amount of IV fluids. Doctors at Erlanger preliminarily diagnosed sepsis; the death certificate reflects that the Deceased died of that condition, but Dr. Cifu is of the opinion that there is no definitive evidence that she had sepsis. Dr. Cifu stated that the fluids given by Erlanger were simply "too much for her body to handle" and that she "died of respiratory arrest or a failure of respiratory/pulmonary function due to the aggressive measure pursued by Erlanger Medical Center in attempting to resuscitate her."

The Defendants say that most of the former employees who testified had not treated the Deceased. In addition, the Defendants say that the testimony of a former staffing coordinator supports their position that the Defendants took steps to insure that "caregivers were hired and properly staffed when necessary." One former employee testified, "There is no way possible as best I can figure that somebody could be neglected for days on end without somebody noticing." A former regional vice-president of two of the corporate Defendants testified that the administrator of the facility and the director of nursing during 2003 were "very patient, focused, patient advocate people." He also said that Stratford House "tended to run over its budget in labor" and "ran over in CPA hours."

A witness who formerly conducted nursing home investigations testified that inspections in Tennessee are unannounced and, hence, not known to the facility in advance. She also said that the annual survey for 2003 for Stratford House shows that "the state inspectors found no indication of inadequate staffing at the Stratford House," no soiled bed clothing, no evidence of neglect or of untreated decubitus wounds.

II.

The Administratrix raises the following issues:

> Whether the trial court was correct in granting summary judgment as to the Administratrix's claims of ordinary negligence.

> Whether the trial court was correct in granting summary judgment as to the Administratrix's claims of negligence *per se* for violations of state and federal regulations of nursing homes.
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> Whether the trial court was correct in granting summary judgment as to the Administratrix's claim for violations of TAPA.
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> Whether summary judgment on the Administratrix's claim for punitive damages was correctly entered.
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> Whether the trial court's denial of the motion for partial summary judgment filed by HP/Stratford House, Inc., and HP Holding, Inc., on the plaintiff's wrongful death claim is properly before this court.

III.

Our review of the matters in this appeal is *de novo.* ***Blair v. West Town Mall***, 130 S.W.3d 761, 763 (Tenn. 2004). There is no presumption of correctness accorded to the trial court's determinations of a summary judgment issue. ***Id***. The evidence must be viewed "in the light most favorable to the nonmoving party." ***Eyring v. Fort Sanders Parkwest Med. Ctr., Inc.***, 991 S.W.2d 230, 236 (Tenn. 1999). We must "take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993) (citations omitted). Then, if there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied. ***Id***. at 211 (citation omitted).

In ***Hannan v. Alltel Publ'g Co.***, 270 S.W.3d 1 (Tenn. 2008), the Supreme Court addressed the burden-shifting analysis in summary judgment cases. The Court initially stated the general principles that have been the law of this State under ***Byrd v. Hall***, as follows:

> Summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; ***Byrd v. Hall***, 847 S.W.2d 208, 214 (Tenn. 1993). In ***Byrd***, this Court set out the basic principles involved in determining whether a motion for summary judgment should be granted. The moving party has the ultimate burden of persuading the court that "there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." ***Byrd***, 847 S.W.2d at 215. If the moving party makes a properly supported motion, the burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists. ***Id***.

Hannan, 270 S.W.3d at *5. The High Court then stated that "in Tennessee, a moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." ***Id***. at *8-9.

IV.

A.

It is well established in Tennessee that not every allegation of wrongdoing against a hospital or a doctor is necessarily for medical malpractice. ***Estate of Doe v. Vanderbilt Univ., Inc.***, 958 S.W.2d 117, 120 (Tenn. Ct. App. 1997) (failure to notify former patient that blood transfusion had not been tested for human immunodeficiency virus (HIV) sounded in negligence and not medical malpractice.) *See also* ***Pullins v. Fentress County Gen. Hosp.,*** 594 S.W.2d 663, 664-65 (Tenn. 1979) (hospital's alleged failure to keep premises free of brown recluse spiders judged by ordinary negligence standard); ***Turner v. Steriltek, Inc.***, No. M2006-01816-COA-R3-CV, 2007 WL 4523157, at *8 (Tenn. Ct. App. M.S., filed December 20, 2007) (ordinary negligence when hospital did not implement policy to ensure surgical instruments sterile and as result patient had to undergo second surgery); ***Peete v. Shelby County Health Care Corp***., 938 S.W.2d 693, 696 (Tenn. Ct. App. 1996) (ordinary negligence when patient struck in head as hospital employee attempted to dismantle orthopedic suspension bar); ***Keeton v. Maury County Hosp***., 713 S.W.2d 314, 317-18 (Tenn. Ct. App. 1986) (ordinary negligence when patient fell trying to get to bathroom after catheter removed and patient not given urinal); ***Franklin v. Collins Chapel Connectional Hosp.*** 6696 S.W.2d 16, 20 (Tenn. Ct. App. 1985) (*res ipsa loquitur* case, not medical malpractice, when nursing home resident scalded while orderly gave bath); ***Harvey v. Wolfer***, No. 03A01-9512-CV-00452, 1996 WL 94819, at *1-2 (Tenn. Ct. App. E.S., filed March 6, 1996) (ordinary negligence, not medical malpractice, when hospital physician attempted to assist patient but dropped her).

In an order dated October 11, 2006, the trial court held that Administratrix's allegations sound in medical malpractice, and not ordinary negligence. The court said:

> The allegations of the complaint are strikingly similar to those in the Court of Appeals case of *Flossie Howard et al. v. Kindred Nursing Centers Limited Partnership et al*., No. W2005-2360-COA-R3-CV.[4] Pivotal to the determination of the statute of limitations issue in *Howard (supra)* was whether or not the case sounded under the Tennessee Medical Malpractice Act or under common law negligence principles. The Court held the case sounded in malpractice and was controlled by the Tennessee Medical Malpractice Act. This Court agrees with the analysis in the cited case. . . .

[4] ***Howard v. Kindred Nursing Ctrs. Ltd. P'ship***, No. W2005-02360-COA-R3-CV, 2006 WL 2136466 (Tenn. Ct. App. W.S., filed August 2, 2006.)

> Accordingly, this Court finds the gravamen of this action sounds in medical malpractice, [sic] this cause is controlled by the Tennessee Medical Malpractice Review Act . . . .

(Footnote added.)

In ***Howard***, the court held that the statute of limitations barred the allegations of the Administratrix that sounded in ordinary negligence. In determining the applicable statute of limitation, the court had to first determine whether the action sounded in medical malpractice or ordinary negligence. ***Howard***, 2006 WL 2136466, at *5. The court noted that "the distinction between the two is subtle, and can be problematic in any given case against a health care provider." ***Id.*** The ***Howard*** court explained the distinction as follows:

> [W]hen a claim alleges negligent conduct which constitutes or *bears a substantial relationship to the rendition of medical treatment by a medical professional*, the medical malpractice statute is applicable. Conversely, when the conduct alleged is not substantially related to the rendition of medical treatment by a medical professional, the medical malpractice statute does not apply.

Id. (quoting ***Gunter v. Lab Corp. of Am.***, 121 S.W.3d 636, 641 (Tenn. 2003) (emphasis added by ***Howard*** court)). In finding that the actions complained of sounded in medical malpractice, the court held that "the complaint was based upon allegations of professional negligence by nurses in failing to adequately care for the Decedent while she was receiving medical treatment at Baptist Hospital. The plaintiffs' allegations of negligent conduct 'bear . . . a substantial relationship to the rendition of medical treatment by a medical professional,' and are therefore subject to Tennessee's Medical Malpractice Act." ***Id***. (citations omitted).

The ***Howard*** court applied the "substantial relationship" test of ***Gunter***, a decision in which the Supreme Court found that a claim against a testing laboratory over a negligently performed paternity test sounded in ordinary negligence, and not medical malpractice. ***Gunter***, 121 S.W.3d at 637. A federal district court, applying the "substantial relationship" test of ***Gunter***, has noted that the characterization of a claim as being for ordinary negligence or for medical malpractice "is a fact-sensitive inquiry, and the distinction is not always clear." ***Estate of Hardin v. Broadmore Senior Servs., LLC***, 2007 WL 2112670, at *7 (M.D. Tenn. 2007).

In ***Howard***, the court listed the allegations of ordinary care in a footnote. The claims of ordinary care were:

> failure to properly provide accurate and complete nursing assessments for the Decedent; failure to properly develop and implement an individual nursing plan for the Decedent; failure to prevent the Decedent from becoming dehydrated; failure to prevent the Decedent

> from developing pressure ulcers; failure to treat those ulcers; failure to supervise the nursing staff assigned to care for the Decedent; failure to evaluate the Decedent's response to nursing care; and failure to record and report to physicians the signs and symptoms of changes in the Decedent's physical condition.

Howard, No. W2005-02360-COA-R3-CV, 2006 WL 2136466, at *2, n.2. In this case the Administratrix asserts the following as ordinary negligence: failure to turn the Deceased every two hours and reposition her to prevent bed sores; failure to properly treat the bed sores once they developed, failure to assist the Deceased in eating, failure to provide water and to encourage her to drink, failure to bathe her, failure to clean her after incontinence, and failure to adequately staff the nursing home.

A distinction used by this court, prior to the holding in ***Gunther***, was stated as follows :

> Medical malpractice cases typically involve a medical diagnosis, treatment or other scientific matters. The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring specialized skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience of the trier of fact.

Estate of Doe, 958 S.W.2d at120-21 (citations omitted).

In this case, we agree with the trial court that ***Howard*** is instructive with respect to the facts of this case. We hold that the gravamen of the case sounds in medical malpractice. The Administratrix's allegation of conduct she claims is ordinary negligence such as evaluation of how a particular patient needs to be fed or hydrated, whether the patient is at risk for pressure sores, how often an at-risk patient needs to be turned, how to treat pressure ulcers if they develop, how many caregivers are needed to minister to a particular group of patients and similar allegations, are decisions relating to the care of the Deceased that necessarily involve medical knowledge. These decisions "bear . . . a substantial relationship to the rendition of medical treatment by a medical professional" and are therefore subject to Tennessee's Medical Malpractice Act. We must conclude, as we did in ***Howard***, that despite the Administratrix's attempt to characterize the issues of care as ordinary negligence, the trial court did not err in holding that the Tennessee Medical Malpractice Act governs this litigation.

B.

The Administratrix asserts that the Defendants are liable for negligence *per se* based on violations of various state and federal regulations of nursing home care. In Tennessee there are three

elements of a negligence *per se* claim. As this court stated in ***Smith v. Owen***, 841 S.W.2d 828 (Tenn. Ct. App. 1992):

> The doctrine of negligence *per se* is firmly established in our case law. In order to recover on the basis of negligence *per se*, three elements must be established. First, it must be shown that the defendant violated a statute or ordinance which "imposes a duty or prohibits an act for the benefit of a person or the public." Second, the proof must show that the injured party was within the class of persons whom the legislative body intended to benefit and protect by the enactment of that particular statute or ordinance. In addition to establishing negligence *per se* by showing these two elements, the plaintiffs must of course show that such negligence was the proximate cause of the injury.

Id. at 831. However, this court has noted that "[t]he negligence *per se* doctrine is not a magic transformational formula that automatically creates a private negligence cause of action for the violation of every statute. Not every statutory violation amounts to negligence *per se."* ***Whaley v. Perkins***, No. W2004-02058-COA-R3-CV, 2005 WL 1707970, at *10-11 (Tenn. Ct. App. W.S., filed July 21, 2005) (quoting ***Rains v. Bend of the River***, 124 S.W.3d 580, 590-91 (Tenn. Ct. App. 2003)).

The trial court in the instant case held: "The Court finds no negligence *per se* claim and no common law negligence claim with the exception of claims to be tried under the [Tennessee Medical Malpractice Act] [that have] survived the motions for partial summary judgment." The trial court relied on ***Conley v. Life Care Centers of America, Inc.***, 236 S.W.3d 713 (Tenn. Ct. App. 2007). In ***Conley***, the plaintiff claimed that violations of federal regulations found at 42 C.F.R. § 483 were negligence *per se.* ***Id***. at 732-33. Having already ruled that the plaintiff's claims sounded only in medical malpractice, the court held in ***Conley*** that the regulations are "too vague and general to constitute a standard of care." ***Id***. at 733. The court set out four of the 15 regulations relied on by the plaintiff in ***Conley*** to demonstrate the reason for its holding that the regulations are too vague and general to be enforced as standards:

> a. Pursuant to 42 C.F.R. § 483.10 the nursing home had an obligation and a duty to assure that resident's [sic] rights are followed and to assure that each residence [sic] has a dignified existence and the right to exercise his or her rights as a resident and as a citizen of the United States.
>
> b. Pursuant to 42 C.F.R. § 483.13(c) the nursing home had the duty to develop and implement written policies and procedures that prohibit mistreatment, neglect, abuse of residence [sic], and misappropriation of resident's [sic] property.

* * *

> g. Pursuant to 42 C.F.R. § 483.25(f) the nursing home had a duty to ensure that residents who display mental or psychological adjustment difficulties, receive appropriate treatment and services to correct the assessed problem.
>
> h. Pursuant to 42 C.F.R. § 483.25(h) the nursing home had a duty to ensure that resident's [sic] environment remain free of accident hazards and that each resident receives adequate supervision and assistance to prevent accidents.

Id. The court in ***Conley*** stated its concerns about creating a national standard of care that would "run afoul" of the Tennessee malpractice statute's locality rule. ***Id***. at 733-34.

The Administratrix argues in this case that, unlike the plaintiff in ***Conley***, she has presented expert testimony that, in Tennessee, the regulations define the absolute minimum standard of care. The Administratrix also asserts that the regulations relied on in this case are specific. Examples of the regulations taken from the Administratrix's brief are the following:

> (c) Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that
>
> (1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and
>
> (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.
>
> (d) Urinary incontinence. Based on the resident's comprehensive assessment, the facility must ensure that
>
> (1) A resident who enters the facility without an indwelling catheter is not catheterized unless the resident's clinical condition demonstrates that catheterization was necessary; and

> (2) A resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore as much normal bladder function as possible.[5]
>
> * * *
>
> (i) Nutrition. Based on a resident's comprehensive assessment, the facility must ensure that a resident
>
> (1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and
>
> (2) Receives a therapeutic diet when there is a nutritional problem.
>
> (j) Hydration. The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health.

The Administratrix thus argues that ***Conley*** dealt only with medical malpractice and is not controlling in this case.

We disagree. We refuse to use the federal regulations of nursing homes, or the state regulations based on them, to create a cause of action separate and apart from a medical malpractice action. Our refusal is compelled by the extant law of medical malpractice in Tennessee which is statutorily based and requires that "a plaintiff must show that the defendant failed to act with ordinary and reasonable care *when compared to the customs or practices of physicians from a particular geographic region*." ***Conley***, 236 S.W.2d at 734 (quoting ***Sutphin v. Platt***, 720 S.W.2d 455, 457 (Tenn. 1986)) (emphasis added). As stated in ***Conley***, "The United States of America fails to qualify as 'a particular geographic region.' " ***Id.*** This holding is also consistent with our decision in ***Latiff v. Dobbs***, E2006-02395-COA-R3-CV, 2008 WL 238444, at *13 (Tenn. Ct. App. E.S., filed January 29, 2008). We thus hold that the trial court in this case did not err in dismissing the Administratrix's allegations of negligence *per se.* While the regulations may well be relevant in a medical malpractice setting, they do not create a distinct cause of action.

C.

The Administratrix in this case also alleges a cause of action under TAPA, Tenn. Code Ann. § 71-6-101 *et seq*.. The trial court held that the "gravamen of this action sounds in medical malpractice, this cause is controlled by the Tennessee Medical Malpractice Review Act, and the

[5] The Administratrix also included regulations concerning range of motion—therapy to prevent rigidity of the body.

allegations concerning the [TAPA] are dismissed, summary judgment being granted for the defendants on those allegations."

The Administratrix in this case argues that TAPA and the Tennessee Medical Malpractice Act may coexist. We certainly agree. But we hold that the allegations of the complaint in this case sound in medical malpractice. In the section of TAPA concerning remedies, the Act expressly provides that it does not apply to a cause of action within the scope of the Tennessee Medical Malpractice Act. Tenn. Code Ann. § 71-6-120 (g) (2004). Thus, we conclude that TAPA does not apply in this case.

D.

The Administratrix seeks to recover punitive damages. The trial court held:

> The plaintiff must prove by clear and convincing evidence that the defendants have acted intentionally, recklessly, maliciously, or fraudulently to be awarded punitive damages. The Court finds the record, taken in the light most favorable to the plaintiff, does not contain any such evidence. Accordingly, the motion for summary judgment is sustained as to the punitive damages claim, there being no material dispute of law or fact.

The court, however, erroneously applied the standard to be used at trial rather than the criteria applicable to a summary judgment motion. First, on a summary judgment motion, the burden is not on the Administratrix to "prove" punitive damages or to prove such damages "by clear and convincing evidence,"as the court and the Defendants assert. Under a long line of Supreme Court cases culminating in ***Hannan***, the burden is on the Defendants to either negate an element of a claim for punitive damages or to show "that the nonmoving party cannot prove an essential element of the claim at trial." ***Hannan***, 270 S.W.3d at *8-9. In a summary judgment motion it is the moving party, not the nonmovant, who has the burden of persuasion. ***Byrd***, 847 S.W.2d at 215.

In this case, the trial court prematurely considered the sufficiency of the nonmoving party's evidence when the moving party had failed to make any showing that would shift the burden of production to the Administratrix. As the Supreme Court noted, "It is not enough for the moving party to challenge the nonmoving party to 'put up or shut up' or even to cast doubt on a party's ability to prove an element at trial." ***Hannan***, 270 S.W.3d at *8.

To emphasize, "in Tennessee, a moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." ***Id***. at *8-9. The Defendants did not meet this burden. The trial court thus erred in granting summary judgment to the Defendants on the punitive damages issue. We vacate that part of the judgment.

E.

The Administratrix argues that the trial court's decision to deny the motion of the Defendants HP/Stratford House, Inc., and HP Holding, Inc. ("the HP Defendants") for summary judgment as to the medical malpractice claims of the Administratrix is not properly before us. We disagree. The trial court's certification under Tenn. R. Civ. P. 54.02 vested this court with jurisdiction to review this decision by the trial court just as it did with respect to the other judgments of the trial court previously discussed in this opinion.

F.

Finally, the HP Defendants argue that the trial court should have granted their motion for partial summary judgment. We disagree. While these Defendants are the beneficiaries of the trial court ruling that the Administratrix's claims are to be evaluated exclusively under the Tennessee Medical Malpractice Act, there are genuine issues of material fact as to whether these Defendants were guilty of malpractice under that Act. The trial court did not err in refusing to grant them summary judgment on the Administratrix's suit under the Act.

V.

The judgment of the trial court granting summary judgment as to the Administratrix's claims of ordinary negligence, negligence *per se*, and violations of the Tennessee Adult Protection Act are affirmed. The granting of summary judgment as to the Administratrix's claim for punitive damages is vacated. The judgment of the trial court denying the HP Defendants summary judgment is affirmed. This case is remanded for further proceedings consistent with this opinion. We tax costs on appeal to Kimberley S. French, Administratrix of the Estate of Martha S. French.

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CHARLES D. SUSANO, JR., JUDGE